Rights of Accused in Criminal Justice Administration in India: An Appraisal of Judicial Activism

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Synopsis

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If men were angels, no government would be necessary.

—James Madison

Like in every civilized society, in India too a criminal justice system evolved. Socio-economic and political conditions prevailing during different phases of the history of India influenced its evolution. Accordingly, the objectives of the criminal justice and methods of its administration changed from time to time and from one period of history to another. To suit the changing circumstances the rulers introduced new methods and techniques to enforce law and administer justice.

I. Criminal Justice System in India during Ancient Period:

In early society the victim had himself (as there was no State or other authority) to punish the offender through retaliatory and revengeful methods; this was, naturally, governed by chance and personal passion.[3] Even in the advanced Rig-Vedic period there is a mention that punishment of a thief rested with the very person wronged.[4] Gradually, individual revenge gave way to group revenge as the man could not have grown and survived in complete isolation and for his very survival and existence it was necessary to live in groups. Group life necessitated consensus on ideals and the formulation of rules of behavior to be followed by its members. These rules defined the appropriate behavior and the action that was to be taken when members did not obey the rules.[5] This code of conduct, which governed the affairs of the people, came to be known as Dharma or law. In course of progress man felt that it was more convenient to live in society rather than in small groups. Organizations based upon the principle of blood relationship yielded, to some extent, to larger associations—the societies.

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[3] Dr. Mrinmaya Choudhuri, *Languishing for Justice*, *4.*

[4] *Ibid.*, (quoting Keith, A. Berriedale: "The Age of the Rig Veda" in *The Cambridge History of India*, edited by J. Rapson, Vol. I, p.87).

[5] *id.,at* 4-5.

In the very early period of the Indian civilization great importance was attached to *Dharma*. Everyone was acting according to *Dharma* and there was no necessity of any authority to compel obedience to the law. The society was free from the evils arising from selfishness and exploitation by the individual.[6] Each member of the society scrupulously respected the rights of his fellow members and infraction of such rights rarely or never took place.[7] The following verse indicates the existence of such an ideal society.

There was neither kingdom nor the King;

neither punishment nor the guilty to be punished.

People were acting according to Dharma; and thereby protecting one another.[8]

However, the ideal stateless society did not last long. While the faith in the efficacy and utility of Dharma, belief in God and the God fearing attitude of people continued to dominate the society, the actual state of affairs gradually deteriorated. A situation arose when some persons began to exploit and torment the weaker sections of society for their selfish ends. Tyranny of the strong over the weak reigned unabated. This situation forced the law abiding people to search for a remedy. This resulted in the discovery of the institution of King and establishment of his authority over the society, which came to be known as the State.[9] As the very purpose of establishing the State and' the authority of the King was the protection of person and property of the people, the King organized a system to enforce the law and punish those who violated it. This system came to be known as criminal justice system.

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[6] 1 M. Rama. Jois, *Legal and Constitutional History of India*, 575-76.

[7] Supra note 1 at 5 (quoting Alfred Russel Wallace as quoted by Durant, Will: *The Storey of Civilization* (Part I) Our Oriental Heritage, p. 27.)

[8] Supra note 4 at 576, quoting Mahabharata, Shanti Parva, 59-14" *Naiv rajyam na raja-assinnh dando na cha dandikah; Dharmenaiv parjah sarva rakshanti sma parsparam.).*

[9] *Ibid.*

The beginning of a regular system of state judicial administration may be traced to the pre-Mauryan age. The Mauryan period (c. 326-185 B.C.) fills a gap between two great epochs of administration of criminal justice in ancient India, namely, that as mentioned in the Dharma sutra on the one hand and that of Manu's code on the other.[10] The few references in Megasthenes' Indica to the penalties for offences current in Chandragupta's time breathe the spirit of the penal law of the preceding period.[11] From Pillar Edict IV of Ashoka, we learn that even after his conversion to Buddhism he continued the death penalty for crimes, only softening its rigour by giving the convicts three days' respite before execution. The system of justice of the precedin period appears to have been continued by the Mauryas.' The old division of urban and rural judiciary was continued in Ashoka's reign. The few references in the records of Mauryas point to the continuance of the state police of the preceding period. The jail administration of the earlier times appears to have been continued.[12]

Judicial System in Villages

The criminal justice system of ancient India was so organized that every villager had easy and convenient access to a judicial forum. in Vedic society the village Saniitis and Sabhas were two important instruments of Indian polity. The Village Councils, similar to modem Panchayats, consisted of a board of five or more members to dispense justice to villagers.[13] The administration of justice was largely the work of these village assemblies or other popular or communal bodies. Village

[10] II The Gazetter of India, 152.

[11] Smith, *op. cit.*, pp. 97-98. Megasthenes came to Patliputra during the period of Chandragupta Maurya about the year 302 B.C. as an ambassador of Seleukos following the peace between Syria and India.

[12] Ibid.

[13] V.D. Kulshreshtha, Landmarks in India Legal And Constitutional History, 6 (quoting S. Varadachariar, *The Hindu Judicial System*, 88).

headman had the authority to levy fines on offenders. There were several village committees, including a justice committee, appointed by people's vote.[14] Village Council dealt with simple civil and criminal cases. Other criminal cases were presented before the central court Or the courts in towns and district headquarters presided over by the government officers under the Royal authority to administer justice.[15]

Examination of Witnesses and Perjury

It was prescribed that the examination of witnesses should not be delayed. A serious defect, namely, miscarriage of justice, would result owing to delay in examination of witnesses.[16] Witnesses were under legal compulsion to give evidence before the court. Failure to appear before the court entailed heavy penalty. Failure to give evidence amounted to giving false evidence.[17] Peijury, i.e. the act of giving false evidence, was considered a serious offence and punishment was prescribed for it.[18] The entire wealth of a person, who cited false witnesses out of greed, would be confiscated by the King, and in addition he would be externed.[19] The party whose witnesses deposed against him could examine futher and better witnesses to prove his case as well as to prove that the witnesses examined earlier were guilty of perjury.[20]

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[14] Supra note 4 at 676 – 78 (quoting an inscription of King Parantaka, found at Uttaramerur, and Annual Reports of Archaeological Survey of India 1904-5, 131).

[15] id. at. 6-7.

[16] *Supra note 11 at* 544 (quoting Katyana 339-340).

[17] *Id at 542* (quoting Manu VIII-107 and Yaj. II-77)

[18] *Id at* 385-86.

[19] *Id at 388 (quoting Katyana 407).*

[20] *Id at 550.*

Peoples Participation in Crime Prevention

Failure of duty towards society was taken very seriously. Any person who fails to render assistance according to his ability in the prevention of crime would be banished with his goods and chattel.[21] Any owner of a house failing to help another at the time of outbreak of fire was liable to be fined.[22] Double punishment was prescribed for those who failed to give assistance to one calling for help though they happened to be on the spot or who ran away after being approached for help.[23]

II. Criminal Justice System in India during Mughal Period :

During the Muslim rule in India, Islamic law or Shara was followed by all the Sultans and Mughal Emperors. Muslim criminal law as applied in India, was supposed to have been defined once for all in the Quran as revealed to the Arabian Prophet and his traditional sayings (hadis).[24]

The Muslims followed the principle of equality for men and they had no faith in the graded or sanctified inequality of caste system. Muslim religion places every man on an equal footing before God, overriding distinctions of class, nationality, race and colour. However, this concept of equality was applicable only to the Muslims. Under the Muslim law, non-Muslims did not enjoy all the rights and privileges which the Muslims did. They were not treated as equal to Muslims in law and were called "zimmis". Their evidence was inadmissible in the courts against the Muslims. They had to pay an additional tax called 'jizya' and as regards other normal taxes also they had to pay at double the rate than what a Muslim paid.[25]

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[21] *Id at* 380 (quoting Manu IX-274)

[22] *Ibid.*

[23] *Id at* 381 (quoting Vishnu 31-74).

[24] Supra note 1 at *61*.

[25] Supra note 11 at *28*.

A special feature of the Muslim law was that the Muslim criminal jurisprudence treated criminal law as a branch of private law rather than of public law. The principle governing the law was more in the nature of providing relief to the person injured in civil matters rather than to impose penalty for the offence committed. It was for the private persons to move the State machinery against such offences and the State would not *suo-moto* take cognizance of the same.[26]

Judicial System in Villages

During the Muslim rule in India village continued to be the smallest administrative unit of the government. Each *paragnah* consisted of a group of villages. For each group of villages there was a village *Panchayat,* a body of five leading men, elected by the villagers. The head of *Panchayat* was known as *Sarpanch.*[27]

Crimes and Criminal Procedure

Contrary to the practice under Hindu law, all crimes were not considered injuries to the State under the Islamic penal law. The offences were classified under three heads, namely, (i) crimes against God, (ii) crimes against the State, and (iii) crimes against private individuals.

Crimes against God and the State were treated as offences against public morals. Other crimes were treated as offences against the individuals; it was for the private persons to move the State machinery against such offences and the State would not suo-moto take cognizance of the same. While an offence like murder, which under modem law is treated as the most heinous crime, was considered as an

[26] Supra note 4 at 12-13.

[27] Supra note 11 at 23-24.

offence against individual but drinking wine was considered a very serious offence against society).[28]

Punishments

The punishments for various offences were classified into four broad categories, viz (a) *kisa*, i.e. retaliation which meant in principle, life for life and limb for limb; (b) diya meant bloodmoney being awarded to the victim or his heirs; (c) hadd inflicted on persons who committed offences against God; (d) tazeer, i.e. punishment for the cases not falling under hadd and kisa. The punishment which fell in this category consisted of imprisonment, corporal punishments and exile or any other humiliating treatment.[29] The type and quantum of penalty to be imposed was entirely within the discretion of the Judge. In criminal cases, a great deal of discretion was allowed to them and they took a variety of factors into account in awarding punishment.[30] Punishments prescribed were very cruel. Mutilation of the body was one of the type of punishment which resulted in great suffering and gradual death.[31]

A special feature of the punishments was that of diya i.e. bloodmoney. This applied to cases of certain offences including those falling under kisa. Bloodmoney was awarded to the victim or the heirs of the victim in a fixed scale. In the cases falling under kisa also the person entitled to inflict injury on the wrong doer could forego his right by accepting diya. If one of the heirs accepted kisa and gave pardon, the other, heirs had, no other alternative than to accept - their share of bloodmoney. According to a fatwa delivered in march 1791, one man named Mongol Das

[28] Dalbir Bharti, The Constitution and Criminal Justice Administration, 34-35 (APH Publishing Corporation, New Delhi 2002)

[29] Supra note 4 at *10*.

[30] Supra note 8 at *464*.

[31] Supra note 4 at 12-15.

murdered his wife and one of her heirs gave pardon and therefore no death sentence could be inflicted at the instance of other heirs and they had no alternative but to receive diya. Another special feature of the Muslim criminal law was that the death sentence was required to be executed by the heirs of the deceased.[32]

III. Criminal Justice System in India during British Period:

Codification of Laws

The Draft Penal Code, which was drafted and submitted to the Governor-General in 1837, was revised and enacted into law in 1860 by Indian Legislature.[33]The Indian Penal Code based on English principles wholly superseded the Mohammedan criminal law. A general Code of Criminal Procedure followed in 1861 and the process of superseding native by European law, so far as criminal justice is concerned, was completed by the enactment of Evidence Act of 1872.[34]The British by codification and by introducing the English principles of equity, justice and good conscience, made significant improvement in the preceding criminal laws.

The British after assuming power in India found the then prevailing criminal justice administration defective decided to bring about drastic changes in it. Lord Cornwallis made detailed studies of the existing conditions of the criminal justice administration. He introduced many reforms to revamp the whole system. Lord Hastings took special interest in reorganizing the police force to deal with the criminals and maintain law and order in the country. Lord Bentinck created the post of District and Sessions Judge and abolished the practice of sati. In 1843, Sir Charles Napier introduced a police system on the lines of Royal Irish Constabulary. He

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[32] *Ibid.*

[33] *Supra* note 11 at 251.

[34] *Supra* note 4 at 53-54 (quoting Illbert, 354-55).

created the post of Inspector-General of Police to supervise the police in the whole province. Subsequently, the Indian Police Act of 1861 was enacted on the recommendations of a Commission which studied the police needs of the Government. They codified the existing laws; established the High Courts and Prisons Laws.

Thus, the British introduced reforms wherever necessary. They adopted new principles by modifying the existing laws wherever required and made new laws where they felt it was a must. The institutions of police, magistracy, judiciary and jails developed during the British period still continue without significant changes in their structure and functioning. However, the British rulers also, while restructuring the criminal justice system, did not fully implement the concept of equality. The reforms introduced by them treated all Indians and non-British Europeans equally but the British always enjoyed special privileges. It was only with the Constitution of India coming into being that the right to equality before law was fully recognized and incorporated in the Constitution as a Fundamental Right.

IV. Judicial Activism and its Impact on Criminal Justice System

When law enforcing agencies submit complaint against an accused before a Court of law, prayer is made for trial on the basis of materials which prima facie suggest that the accused may have committed the crime with which he is charged.[35] The accused is still fortified with the presumption of innocence which has to be dislodged by leading evidence in Court. Thus, Judiciary constitutes the highest authority in the scheme of Administration of Criminal Justice and it alone decides the guilt or innocence of the accused. After Maneka Gandhi's case Supreme Court has interpreted article 21 to include a wide variety of positive and negative rights.

[35] Code of Criminal Procedure, S. 173

Implementation of rule of law

The obligation of judiciary for the implementation of the Rule of Law begins from the stage of detection of the crime itself. The next stage is investigation, and then the prosecution of the offender and thereafter only comes the Court when the trial takes place. Therefore, the period from the time of detection of crime till conclusion of the trial, is all covered within the ambit of implementation of Rule of Law. Every agency which is involved at any stage of this process must, therefore, partake its responsibility of performing actively so as to provide active implementation of Rule of Law, without which there cannot be a functioning democracy.

Almost global concept in Criminal Jurisprudence is the problem arising out of delay which is very prone to defeat justice. In many cases, the criminals became discharged from their cases and find some time and extra energy to commit further crimes but there can hardly be one way traffic. Side by side, we find, in reality, that many undertrial prisoners are foced to languish in jail custody from year to year. As per the settled principle of Criminal Jurisprudence, a man, however grave his commission of the alleged offence may be, should be presumed to be innocent unless his guilt is established by cogent evidence in a Court of competent jurisdiction, may even in the Apex Court. Accordingly, the accused persons can demand speedy disposal of cases as guaranteed under article 21 of the Constitution.[36]

Causes of delay in disposal of cases : The obvious causes of delay in disposal of the criminal cases are not very far to seek. The cases are : (1) frquent adjournment petitions, (2) lengthy cross-examinations without any useful purpose, (3) lengthy arguments which, on many occasions, sound much like an empty vessel without much substance, (4) the inadequacy of staff (5) the non-co-operation of the police, (6)

[36] Prabhat Kumar Basumallik, 'Speedy Trial', 1993 Cr LJ 63 (Journal).

the absence of judges, (7) the absence of competent judges. Poor suffer due to technicality and procedure while the rich is able to buy the legal time by illegal-tactics.[37]

The Hon'ble Supreme Court in Kadra Pehadiya v. State of Bihar,[38] observed quite pertinently 'It is a shame upon adjudicatory system which keeps man in jail for years without a trial'. In State of Maharashtra v. Champalal Punjaji Shah,[39] the Supreme Court referred to the Constitution of U.S.A., and European Convention of Human Rights and observed that the legitimate demand of undertrial prisoners for speedy disposal of cases could hardly be brushed aside.

The Full Bench of Patna High Court, in Medheswardhari Singh v. State of Bihar,[40] laid down the following guidelines :- (1) that the right to a speedy trial extends to all criminal prosecutions for all offences generally; (2) it applies to both trial and investigation as per the Code of Criminal Procedure, 1973; (3) it extends to all criminal proceedings inclusive of the stage of trial and appellate stage; (4) Delay of 7 years or more in trial and investigation other than capital punishment violates article 21 of the Constitution.

The Supreme Court, feeling the pulse of unertrial prisoners, in Srinivas V. Union Territory of Arunachal Pradesh,[41] quashed the criminal proceeding because the criminal proceeding arose out of negligence on a part of a driver of a motor

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[37] World Bank, World Development Report 2000-2001-Attacking Poverty, 103 (Oxford University Press, New York, 2001).

[38] AIR 1981 SC 939: 1981 Cr LJ 481: (1981) 3 SCC 671: 1981 SCC (Cri) 791:1981 Cr LR (SC) 109: 1981 BLJR 300.

[39] AIR 1981 SC 1675: (1982) 1 SCR 299: (1981) 3 SCC 610: (1981) 3 SCALE 1161: (1981) SCC (Cri) 762: 1981 Cr LJ 1273.

[40] AIR 1986 Pat 324: 1986 Cr LJ 1771.

[41] AIR 1988 SC 1729: 1988 Cr. LJ 1803 (1988) 4 SCC 36: (1998) SCALE 113: (1988) 2 UJ (SC) 593: (1988) 2 Crimes 950: JT 1988 (3) SC 342: 1988 SCC (Cri) 889.

vehicle to drive the vehicle and accordingly he was charged under section 279 read with section 304A/338, IPC. But the criminal proceeding did not end in course of 9 years for the alleged commission of offence, which was not as grave as the offence of dacoity or murder or rape.

The Calcutta High Court in M.K. Ghosh v. State of West Bengal,[42] observed that the sword of Democles should not hang over the head of accused persons for an indefinite period and that fifteen years elapsed from the date of occurrence. The said case did not end in finally and accordingly the Hon'ble High Court at Calcutta though it fit to quash the proceeding in view of the Constitutional right of the accused under article 21 of the Constitution for speedy trial. Similar fate engulfed another case, namely Ranjit Kumar Pal v. State,[43] in as much as the criminal proceeding remained pending for disposal for 20 years.

The same principle has been reiterated by the Apex Court in Sheela Barse v. State of Maharashtra;[44] Raghubir Singh v. State of Bihar,[45] Srinivas Pal v. Union Territory of Arunachal Pradesh;[46] A.R. Antulay v. R.S. Nayak;[47] Santosh De v. Archana Guha;[48] Union of India v. Ashok Kumar Mitra;[49] State of Maharashtra v.

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[42] 1990 Cr LJ 26:1990 (2) Cal LT 48.

[43] 1990 Cr LJ 643 (Cal): 1990 (2) All Cr LR 97.

[44] AIR 1983 SC 378: (1983) 2 SCC 96: (1983) 2 SCR 337: (1983) 1 SCALE 140: 1983 Cr LJ 642: (1983) 1 Crimes 602: 1983 SCC (Cri) 353: 1983 Cr LR (SC) 207.

[45] AIR 1987 SC 149: (1986) 4 SCC 480: (1986) 3 SCR 802: JT 1986 SC 481: (1986) 2 SCALE 452: 1987 Cr LJ 157: 1986 SCC (Cri) 511.

[46] AIR 1988 SC 1729: (1988) 4 SCC 36: (1988) Supp 1 SCR 477: JT 1988 (3) SC 342: (1988) 2 SCALE 113: 1988 (2) UJ (SC) 593: 1988 Cr LJ 1803: (1988) 2 Crimes 950: 1988 SCC (Cri) 889.

[47] AIR 1992 SC 1701: (1992) 1 SCC 225: JT 1991 (6) SC 431: (1991) 2 SCALE 1273: 1992 Cr LJ 2717: (1992) 1 Crimes 193: 1992 SCC (Cri) 93.

[48] AIR 1994 SC 1229: (1994) Supp 3 SCC 735: 1994 Cr LJ 1975: 1995 SCC (Cri) 194.

Manubhai Paragaji Vashi;[50] Common Cause v. Union of India;[51] Mansukhlal Vithalldas Chowhan v. State of Gujarat;[52] and Common Cause, A Registered Society v. Union of India.[53]

Justice Delayed is Justice Denied : In most of the aforementioned judgments the Supreme Court has followed the principle that justice delayed is justice denied which is squarely applicable to the Criminal Justice System. However, it cannot be said that this liberal and novel approach is the newfound activism of the Court. In fact way back in 1980, in the famous cases of Nimeon Sangma v. Home Secretary, Govt. of Meghalaya,[54] Hussainara Khatoon (I to VI) v. Home Secretary, State of Bihar,[55] and Mantoo Muzumdar v. State of Bihar,[56] the Supreme Court declared that considerable delay in investigation of criminal cases, prolonged detention of under trials awaiting trial and judicial custody of an undertrial beyond the period of the maximum imprisonment possible on conviction for the offence, violate the personal

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[49] AIR 1995 SC 1976: (1995) SCC 768: (1995) 2 SCALE 47: 1995 Cr LJ 3633: 1995 (1) UJ (SC) 784: (1995) 1 Crimes 852.

[50] AIR 1996 SC 1: (1995) 2 SCC 730: (1995) 3 SCJ 610: JT 1995 (6) SC 119: (1995) 2 SCALE 797: (1996) 1 SCJ 1.

[51] (1996) 6 SCC 530: AIR 1996 SC 3538: JT 1996 (8) SC 613: (1996) 3 SCJ 432: 1996 (2) UJ (SC) 802: 1997 (1) Mad LJ 65.

[52] AIR 1997 SC 3400: (1997) 7 SCC 622: 1997 Cr LJ 4059: (1997) 3 Crimes 301 : JT 1997 (7) SC 695: (1997) 3 SCJ 19: (1997) 5 SCALE 667: 1997 SCC (Cri) 1120: (1997) 8 Supreme 178.

[53] (1996) 6 SCC 530: AIR 1996 SC 3538: JT 1996 (8) SC 613: (1996) 3 SCJ 432: 1996 (2) UJ (SC) 802: 1997 (1) Mad LJ 65.

[54] AIR 1979 SC 1518: (1980) 1 SCC 700: (1979) 3 SCR 785: 1979 UJ (SC) 809: 1979 Cr LJ 941: 1980 SCC (Cri) 23.

[55] AIR 1979 SC 1360: (1980) 1 SCC 81 (91, 93, 98, 108 & 115): (1979) 3 SCR 169: 1979 Cr. LJ 1036: 1980 SCC (Cri) 23.

[56] AIR 1980 SC 847: (1980) 2 SCC 406: (1980) 2 SCR 1105: 1980 Cr LJ 546: 1980 SCC (Cri) 504: 1980 UJ (SC) 452.

liberty of undertrial prisoners under article 21. In Nimeon Sangma Justice Krishna Iyer observed :

".....considerable delay in investigation by the police in utter disregard of the fact that a citizen has been deprived of his freedom on the ground that he is accused of an offence, verges on the wholesale breach of Human Rights guaranteed under the Constitution especially under article 21.... criminal justice breaks down at a point when expeditious trial is not attempted while the affected parties are languishing in jail."[57]

Delay in pronouncing the judgment: Even delay in pronouncing the judgment has been reprimanded by the Supreme Court. In Anil Rai v. State of Bihar,[58] the Court observed that unexplained long interval between conclusion of arguments and delivery of judgment shakes the confidence of the people in the judicial system and affects rights of the parties under article 21.

Right to Bail on Prolonged Delay : the Apex Court in Akhtari Bi v. State of Mdahya Pradesh,[59] held that to have speedy justice is a fundamental right which flows from article 21 of the Constitution. Prolonged delay in disposal of the trials and thereafter appeals in criminal cases, for no fault of the accused, confers a right upon him to apply for bail. The Supreme Court in Kuluttumottil Razak v. State of Kerala,[60] while rejecting the request on behalf of the appellant to adjourn the matter on account of strike of the advocate observed that delay in disposing of the matter,

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[57] Nimeon Sangma v. Home Secretary, Govt. of Meghalya, (1980) 1 SCC 700 (701) : AIR 1979 SC 1518: (1979) 3 SCR 785: 1979 UJ (SC) 809: 1979 Cr LJ 941: 1980 SCC (Cri) 328.

[58] AIR 2001 SC 3173: 2001 Cr LJ 3969: (2001) 3 Crimes 458: JT 2001 (6) SC 515: (2001) 3 SCJ 334: (2001) 5 SCALE 41: (2001) 5 Supreme 617: 2001 SCC (Cri) 1009.

[59] AIR 2001 SC 1528: (2001) 4 SCC 355: (2001) SCJ 576: (2001) 4 SRJ 397: (2001) 2 SCALE 525: (2001) 2 Supreme 448: 2001 SCC (Cri) 714.

[60] 2000 SCC (Cri) 829: (2000) 4 SCC 465.

wherein the appellant is in jail, would be a violation of article 21 of the Constitution and accordingly the Apex Court proceeded with the hearing of the appeal after appointing an advocate as an amicus curiae to argue for the appellant.

Right to Fair Trial

In the lankmark Judgment of Maneka Gandhi the Supreme Court has emphatically declared that the 'procedure', in accordance with which the life or personal liberty of a person can be deprived by the State, must be just, fair and reasonable, thereby incorporating the American doctrine of due process under article 21 of the Constitution. Consequently as regards the trial of criminal cases, the Supreme Court has after 1980s in a number of cases recognised the right of undertrial prisoners to a fair trial as a fundamental right under article 21.[61]

In State of Punjab v. Sarwan Singh,[62] the Supreme Court held that article 21 embodies a fair trial in it. The Supreme Court reiterated the principle that the 'procedure established by law' embodies in itself the public and open trial. A special Bench of 9-Judges in Naresh Sridhar Mirajkar v. State of Maharashtra,[63] had occasion to make some very important observations as to why trial must be open. It was stated by Gajendragadkar, C.J. speaking for the majority, that public trial in open Court is essential for the healthy, objective and fair administration of justice, because a trial held, subject to the public scrutiny and gaze, naturally acts as a check against judicial caprice or vagaries and serves as a powerful instrument for creating confidence of the public in the fairness objectivity and impartiality of the administration of justice.[64].

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[61] Dr. G.B. Reddy, Judicial Activism in India, 186.

[62] AIR 1981 SC 1054: (1981) 3 SCC 34:L 3 SCr 349: (19814) 1 SCALE 619: 1981 Cr LJ 722: 1981 Cr LR (SC) 289: 1981 SCC (Cri) 625: (1981) 3 SCJ 50.

[63] AIR 1967 SC 1: (1966) 3 SCR 744.

[64] Naresh Sridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1: (1966) 3 SCR 744 (Para 20).

Other Aspects of Fair Trial : In Santosh v. Archana Guha,[65] the Supreme Court held that delayed trial defeats the right of an accused to speedy and fair trial implicit under article 21. In Joginder Kumar v. State of Uttar Pradesh,[66] the Supreme Court declared that the right of an arrestee to have someone informed about his arrest and the right to consult privately with lawyers are inherent in articles 21 & 22. In the instant case, the Court has issued number of directions for effective enforcement of fundamental rights guaranteed under articles 21 & 22. In commissioner of Police, Delhi v. Registrar, Delhi High Court,[67] the Supreme Court reiterated the assurance of fair trial is the first imperative of the dispensation of justice. In the instant case, the Court directed the police to provide adequate safety to an accused person, as it is his fundamental right under article 21.

Right to Free Legal Aid

In M.H. Hoskot V/s State of Maharashtra,[68] the Supreme Court applied the ruling of Maneka Gandhi's Case.[69] The court held that 'a single right to appeal' on facts, where the conviction is fraught with long loss of liberty, is basic to civilized jurisprudence. One component of fair procedure is natural justice.

Regarding the right to free legal aid, Krishna Iyer, J., declared, "This is the State's duty and not Government's charity." If a prisoner is unable to exercise his constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, there is implicit in the court under Article 142, read with

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[65] AIR 1994 SC 1229: (1994) Supp 3 SCC 1994 Cr LJ 1975: 1995 SCC (Cri) 194.

[66] AIR 1994 SC 1349: (1994) 4 SCC 260: JT 1994 (3) SC 423: 1994 Cr LJ 1981: (1994) 2 Crimes 106: (1994) 2 SCALE 662: 1994 SCC (Cri) 1172.

[67] AIR 1997 SC 95: (1996) 6 SCC 323: (1996) 7 SCALE 517: JT 1996 (9) SC 138: (1996) 7 Supreme 348: 1996 SCC (Cri) 1325: 1996 (2) UJ 770: 1997 Cr LJ 90.

[68] AIR 1978 SC 1548.

[69] Maneka Gandhi V/s Union of India, AIR 1978 SC 597.

Articles 21 and 39-A of the Constitution, the power to assign counsel to the prisoner provided he does not object to the lawyer named by the court. Equally, is the implication that the state which sets the law in motion must pay the lawyer an amount fixed by the court.

In State of Maharashtra V/s Manubhai Pragaji Vashi,[70] the court has considerably widened the scope of the right to free legal aid. The court held that in order to provide "the free legal aid" it is necessary to have well trained lawyers in the country. This is only possible if there are adequate number of law colleges with necessary infrastructure, good teachers and staff. Since the Government is unable to establish adequate number of law colleges, it is the duty of the Government to permit establishments of duly recognized private law colleges and afford them grants-in-aid on similar lines on which it is given to Government recognized law colleges. This would facilitate these colleges to function effectively and in a meaningful manner and turn out sufficient number of well-trained or properly equipped law graduates in all branches year after year. This will in turn enable the state and other authorities to provide free legal aid and ensure that opportunities for securing justice are not denied to any citizen on account of disability.

In Suk Das V/s Union Territory of Arunachal Pradesh,[71] the court has held that failure to provide free legal aid to an accused at the state cost, unless refused by the accused, would vitiate the trial. He need not apply for the same. Free legal aid at the state cost is a fundamental right of a person accused of an offence and this right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. The right cannot be denied to him on the ground that he has failed to apply for it. The Magistrate is under an obligation to inform the accused or this right

[70] (1995) 5 SCC 730.

[71] (1986) 25 SCC 401.

and inquire that he wishes to be represented on the state's cost, unless he refused to take advantage of it.

ARTICLE 21 AND PRISONERS

The credit for humanising the prison atmosphere of the country goes to Justice Krishma Iyer if any one individual can be named in this regard. Justice Iyer has by very eloquent, forceful and convincing reasons brought home to one and all that prisoners do not become non-persons in so far as Article 21 is concerned. Many dehumanising aspects of prison-life have been taken care of by the deeply humane Judge.

Before we advert to the judgements of Justice Krishna Iyer, beginning from Charles Sobhraj running through Sunit Batra, it may be stated that the first judgement of the apex Court in which-Article 21 was brought to the aid of a prisoner State of Maharashtra V. Prabhakar,[72] in which it was held by the Constitution Bench that as there was no prohibition in the concerned condition of the Detention Order, the State infringed upon the personal liberty of the detenue by prohibiting him from writing a book. A three judge Bench also dealt with fundamental rights of Prisoners in Jail in *D. Bhuvan Mohan Patnaik V. State of Andhra Pradesh,*[73] in paragraph 10 of which after referring to *Kharak Singh V. State of U.P.,*[74] wherein it was opined that the word 'Life' in Article 21 means something more than animal existence, the Bench stated that no person, not even a Prisoner, can be deprived of his life or personal liberty except according to the Procedure established bylaw. In that case, the Court was concerned with the segregation of Nexalite Prisoners in a 'quarantine' and the inhuman treatment meted out to them as if they were the inmates of a "fascist

[72] AIR 1966 SC 424.

[73] AIR 1974 SC 2092.

[74] AIR 1963 SC 1295.

concentration camp". The Court emphasised that though the Government possesses the Constitutional right to initiate laws, it cannot, by taking into its own hands, resort to oppressive measures to curb the political beliefs of its opponents. But then, it was opined that whatever the nature and extent of the prisoners' fundamental right of life and personal liberty, they have no fundamental freedom to escape from lawful custody because of which they cannot complain of the installation of the high volt live wire mechanism on the jail walls to prevent escape of prisoners, with which they are likely to come in contact only if they attempt to escape.

In Charles Sobhraj V. Superintendent of Central Jail[75], the Court was seized with the complaint of incarceratory torture and it opened in paragraph 5 that through Articles 14, 19 (1) (d) and 21 "(C)onstitutional Karuna is injected into incarceratory strategy to produce prison justice" and where a prison practice or internal instruction places harsh restrictions on jail life breaching guaranteed rights, the Court directly comes in. It was then observed in Paragraph 8:

"..... Every Prison sentence is a conditional deprivation of life and liberty, with civilised norms built in and unlimited trauma interdicted. In this sense, judicial policing of prison practices is implied in the sentencing power....."

It was, however, stated in paragraph 12 that the Court would be reluctant to intervene in day-to-day operation of the penal system, but undue harshness and avoidable tantrums, under the guise of discipline and security, give no immunity from Court writs. The reason was stated to be that Prisoners retained all rights enjoyed by free citizens except those lost necessarily as incident of confinement and the rights enjoyed by Prisoners under Articles 14, 19 and 21, though limited, are not static and will rise to human heights when challenging situations arise.

[75] AIR 1963 SC 1514.

The aforesaid situation did arise in Sunil Batra V. Delhi Administration,[76] wherein the learned judge in his concurring judgement unfolded and meticulously examined the provisions of prison justice and the role of judicial power Constitutional sentinels in the context of escalating torture by the menials of the State in the virgin area of jurisprudence, which was the cause of "explicative length of the judgment". The question for determination in Sunil Batra was as to when a Prisoner can be put under bar fetters and confined in a solitary confinement. It was opined that liberty to move, mix, mingle, talk and share company with co-prisoners, if substantially curtailed, would be violative of Article 21 in as much as the curtailment has no backing of law. It was pointed out that the word 'Law' in Article 21 has been interpreted in Maneka Gandhi's Case[77] to mean that it must be right, just and fair and not arbitrary, fanciful or oppressive (paragraph 228).

The following stimulating, meaningful and pregnant thoughts finding place in paragraph 207 deserve notice in this regard :

"..... Prison laws, now in bad shape, need rehabilitation, prison staff, soaked in the Raj past, need reorientation; prison house and practices, a hangover of the die-hard retributive ethos, reconstruction; prisoners, those noiseless, voiceless human heaps, cry for therapeutic technology; and prison justice, after long jurisprudential gestation, must now be reborn through judicial midwifery, if need be. No longer can the Constitution be curtained off from the incarcerated community since pervasive social justice is a fighting faith with Indian humanity. I hopefully, alert the nation and, for once, leave follow-up action to the Administration with the note that stone walls and iron bars do not ensure people's progress and revolutionary history teaches that these Bastillers are brittle before human upsurges and many tenents or

[76] AIR 1978 SC 1675.

[77] AIR 1978 SC 597.

iron cells are sensitive harbingers of Tomorrow – many a Socrates, Sri Aurobindo, Tilak, Thoreau, Bhagat Singh, Gandhi ! So it is that there is urgency for bridging the human gap between prison praxis and prison justice; in one sense, it is a battle of tenses and in another, an imperative of social justice".

Solitary Confinment and some other Aspects : The question of solitary confinement came up for consideration by the Supreme Court in *Kishore Singh V. State of Rajsthan*,[78] in which it was stated by justice Krishna lyer that solitary confinement has to be resorted to only in the "rarest of rare cases" for security reasons to make it in consonance with Article 21 of the Constitution.

The thread was picked up by Justice Krishna Iyer himself in Prem Shankar V. Delhi Administration,[79] in which by relying on Sunil Batra's Case it was proclaimed that handcuffing is prima facie inhuman and, therefore, no reasonable, is over-harsh and at the first flush arbitrary. To inflict 'irons' was said to be resort to zoological strategies repugnant to Article 21.

Kishore Singh[80] is also in the same vein stating that this can be done only in the "rarest of rare cases" for security reasons. Kadra Pahadiya V. State of Bihar,[81] states that under-trial prisoners too cannot be kept in leg-irons.

Hussainara's Cases also brought some relief to the prisoners. In one of the cases,[82] it was held that detention of persons beyond the period longer than what they could have been sentenced – if convicted would be illegal and violative of

[78] AIR 1981 SC 625.

[79] AIR 1980 SC 1535.

[80] AIR 1981 SC 625.

[81] AIR 1981 SC 939.

[82] AIR 1979 SC 1369.

Article 21. The same view was expressed in Veena Sethi V. State of Bihar.[83] In Francis Coralie V. Union Territory of Delhi,[84] the permission to have only one interview in a month with the members of the family or the legal advisor of the detainee was held to be violative, inter alia, of Article 21.

Detention of an insane after his declaration as sane without taking steps to release him was held violative of Article 21 in Veena Sethi.[85] This was also the view expressed in Sant Veer V. State of Bihar.[86]

Compensation: Apart from praying for release if under detention, violation of Article 21 has visited the violator with award of suitable amount as compensation. The path-setting decision in this regard is that of Rudal Shah V. State of Bihar,[87] in which Chandrachud, C.J. observed in Paragraph 10 that "one of the telling ways in which violation of Article 21 can reasonably be prevented is to award compensation when it is violated." The Learned Chief Justice stated that "one way for securing due compliance. With the mandate of Article 21 is to mulct its violators in the payment of monetary compensation". and being of this view order for payment of a total sum of Rs.35000/- because the petitioner was released more than 14 years after he was acquitted, because of which his confinement became illegal. It was, however, stated that the compensation awarded in such a case is really to be taken as a "Palliative", because a victim of the present kind cannot be left penniless until the end of his suit, the many appeals and the execution proceedings which would take place if the concerned person were to approach the Court by filing compensation suit, which

[83] AIR 1983 SC 339.

[84] AIR 1981 SC 746.

[85] AIR 1983 SC 339.

[86] AIR 1982 SC 1470.

[87] AIR 1983 SC 1086.

proceeds leisurely. A compensation awarded by a writ Court in such a case does not also prevent the person concerned from bringing a suit to recover appropriate damages (paragraph 12).

Bhim Singh V. State of J&K[88] was the next case in which, for mischievous and malicious detention, compensation of Rs.50,000/- was awarded; may be, because Bhim was an M.L.A. and he was prevented, because of the detention, from attending an impending Assembly Session.

In People's Union for Democratic Rights V. State of Bihar,[89] a sum of Rs.20,000/- was awarded to the person who had succumbed to the injuries sustained in Police firing. Of course, this was ordered with a view to rehabilitate the dependents of the deceased in which case the State itself comes forward to give compensation, which sum ordinarily is Rs.20,000/-

Payment by the State: In a case where violation of Article 21 results due to action by a public officer, compensation is being awarded against the State because of its vicarious liability for the tortuous acts of its employees. This was specifically stated in Saheli, a Women's Resources Centre V. Commissioner of Police, Delhi,[90] and a sum of Rs.75,000/- was awarded. In that case, a child had died due to Police torture.

In Nilabati Bahera V. State of Orissa,[91] a sum of Rs.15 lakhs was awarded to a mother whose son had died during Police Custody. The high compensation was described as "exemplary damages". The Court also observed that forging of "new tools" had become necessary for doing complete justice and for enforcing

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[88] AIR 1986 SC 494.

[89] AIR 1987 SC 355.

[90] AIR 1990 SC 513.

[91] 1993-2, SCC. 746.

fundamental rights guaranteed by the Constitution and it was stated that when awarding of monetary compensation is the only practicable mode of redress available for their contravention by the State or its servants, resort to remedy in Public law by taking recourse to Articles 32 and 226 should be permitted.

Conclusion

There is imminent need to bring in changes in Criminal Justice Administration so that State should recognize that its primary duty is not to punish, but to socialize and reform the wrongdoer and above all it should be clearly understood that socialization is not identical with punishment, for it comprises prevention, education, care and rehabilitation within the framework of social defence. In working towards this goal, the respect for human values must be ensured and we must conceive ourselves that we cannot honestly insist on irreproachable conduct if we do not use methods in conformity with the principle of our civilization. It is also most important that criminal laws should ensure that Human Rights are respected by seeing that the law is strictly adhered to. The Principles of liberty and legality, which are results of historical development of present day society, should be considered inviolable.[92]

Need For Judicial Training Academies :

In many States of U.S.A. there are regular training schools for newly recruited judicial officers. Even the International Association of Judges in their International Congresses at Rome in 1958 and in Nice in 1972 seriously concerned themselves with the question of the initial and in-service training of judges in extra-legal subjects like

[92] Prof. R. Deb. 'Rights of the accused under the Law', 1981 Cr LJ 17.

Criminology, Applied Psychology, Sociology etc. Thus in the Rome Congress it was, inter alia, resolved to achieve the following results.[93]

(i) "Improvement of University education in the modern branches of learning indispensable for the judicial function.

(ii) Creation of Centers, for training, research and study dealing with the formation of Judges by a unified method.

(iii) This training should include extra-legal knowledge in economics, sociology, psychology, criminology and should promote studies and discussions of cases, thereby involving experimental and practical stages".

There is imminent need to change our education system, so that a person may understand the meaning of living in the society, failing which we would be heading towards a disaster, where man would become absolutely self centered, not respecting the personality of others. This requires that the system of education should also have teachings in respect of human values, which must include even Human Rights jurisprudence.

It may be mentioned that we may have the best of the criminal procedure or the Criminal law, it will not be effective unless the implementation machinery, at all levels including general public, police and the Courts are honest in implementing the spirit and the letter of law. For this problem there needs to be strictness right from the top and all the citizens in India should have self-restraint to be honest in spite of all the economic difficulties.[94]

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[93] R. Deb, I.P.S. (Retd.), Advocate, 'Need for Judicial Activism in Administration of Criminal Justice', 1993 Cr LJ 26.

[94] III Harish Chander, Prof., Faculty of Law, University of Delhi, 'Reforms in Criminal Procedure (with reference to the Code of Criminal Procedure, 1973)' the paper read at "the Judicial Seminar on Correctional Services", organised by the Bureau of Correctional Services, Government of India, Ministry of Education and Social Welfare and the Faculty of Law, University of Delhi, in Delhi Law Review 1974, 44.

Presumption of Guilt Theory:

Presumption of guilt theory should be invoked for those state actors who are associated with Criminal Justice delivery system and they abuse the process of law to implicate innocent persons in false cases.

Punishment for making and abetting false accusations:

Criminal Law should be amended to insert same Punishment for those people who make and/or abet willful false accusations or charges against innocent persons for offences being provided for the offences for which innocent persons are accused or charged.

Establishment of Village and Word Councils:

There is a need to establish councils at Village level in villages and ward level in the cities to deal with petty offences to lessen the burden of Courts and imparting speedy justice.

Besides this, it is duty of every individual also to observe the concept of Human Rights and particularly of those, who belong to higher strata of the society.